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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 394

In the Matter of the Application of DANIEL F. O'BRIEN, and LEONARD CASSAT, and others named in the schedule annexed hereto,

Petitioners,

vs.

THEODORE H. LANG as Personnel Director of the Department of Personnel of the City of New York and as Chairman of the Civil Service Commission of the City of New York, GEORGE GREGORY, JR., and ANTHONY M. MAURIELLO, as Commissioners of the Civil Service Commission of the City of New York,

Respondents.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Respondents have distorted the record in an effort to evade the constitutional issues presented.

POINT I.

The record presents substantial questions for the determination of the Supreme Court.

At Special Term, the respondents argued that the pass mark was determined by the examination booklet, not by the announcement of the examination. Properly overruled in this contention,[1] they adopted the tack in the Appellate Division that all the case involved was the Commission's

[1] *Borodkin v. Kern*, 174 Misc. 339, aff'd 260 App. Div. 914, aff'd 285 N. Y. 732. Commission Rule 5.3.19.

right to correct a "clerical"[1] error. Indeed, the record does not support the Commission's contention of error[2] and the Commission's verified answer alleges:

> "Fifteenth: That the utilization of the results of an examination as one of the elements in establishing a passing mark for an examination is a recognized practice in the fields of education and personal testing and is a reasonable and proper exercise of the discretion of the Respondent, the City Civil Service Commission and its duly authorized employees and officials."[3]

The Appellate Division stated, "*If* any error existed it was within Commission's power to correct the same. . . ." (Italics supplied.) However, it did not find that the 70% passing mark was an error. Nor did it concur with respondents' abandoned argument at Special Term that the examination booklet rather than the announcement determined the pass mark. The Appellate Division's reversal of Special Term's determination in favor of the petitioners was based upon a contention never urged by the respondents. The reversal was achieved by holding the fourth announcement void because it was not "published daily, in full for at least one week."[4] By so holding, the Appellate Division

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[1] Actually, Commission Rule 4.5.4 empowers the Commission to correct "manifest" error.

[2] The explanation in the letter of the Director of Examinations that "an 'original' notice of examination bearing the 70% pass mark was incorrectly published" (Record, folio 121) is belied by comparison of the fourth and original notices. Such comparison reveals three major differences between the two notices.

[3] Record, folios 132, 137.

In view of this allegation, there seems no basis for the respondents' attempt at pages 5 and 6 of their brief to distinguish *Gilbert v. Kroll*, 17 Misc. 2nd 409, aff'd App. Div. 2nd 819, aff'd 2 N. Y. 2nd 896 on the ground that the present change of pass mark reflected correction of an error.

[4] Commission Rule 4.1.3. Folios 289-291.

(1) sustained the Commission's *ex post facto* increase in the pass mark after the results of the examination were known and ten months after it was held,[1] (2) struck down a 70% notice because it was not published daily, in full for at least one week so as to reinstate the preceding 75% notice[2] although it, too, was not published daily, in full for at least one week,[3] and (3) permitted the 70% notice to stand for the exclusive benefit of eleven candidates whose participation in the examination depended entirely upon the 70% notice[4] while striking it down to fail the petitioners[5] after they had earned passing grades.[6]

POINT II.

The petition should be granted in the public interest as well as in the petitioners' interest.

As asserted at page 3 of the respondents' brief, each of the petitioners received grades below 73.1% on the written test. Their actual range varied from 69.1% to 73.1%.[7] Concededly, none of the participants in the examination received grades between 73.1% and 74%.[8] Professor

[1] Record, folios 42-143, 144. An Appellate Division holding that the Commission might correct such an error ten months after an examination would conflict with the doctrine of finality of administrative decisions. *People ex rel. Finnegan v. McBride*, 226 N. Y. 252.

[2] Record, folios 290, 191.

[3] It is impossible to fathom the logic of respondents' contention at page 4 of their brief that "one full week" excludes Sunday.

[4] Record, folios 142, 143, 280, 281.

[5] Record, folios 206, 207.

[6] Record, folios 46-51.

Pursuant to Commission Examination Regulation E 17.3, whenever the pass mark is a specific numerical score, a candidate obtaining a rating within any fractional part above the next lower whole number is deemed to have passed.

[7] Record, folios 46-51.

[8] Record, folio 36.

Edward Ladenheim, Professor of Mathematics at Brooklyn Polytechnic Institute, has computed the probability of such an hiatus in grades just before the pass mark with unmanipulated marking to be approximately one in one hundred thousand. Moreover, there was a similar hiatus just below the pass mark in the preceding Captain examination and Professor Ladenheim has computed the probability under normal rating of the occurrence of such an hiatus on these two successive examinations to be approximately one in two thousand billion.

Thus, there is scientific confirmation that the respondents manipulated the eligible list after it was prepared, although the exact manner and full extent of manipulation is unknown. This manipulation is in addition to the change in the pass mark ten months after the examination.

The mark on the written examination reflected only 70% of the entire test mark.[1] The remaining fifty per cent consisted of the record for performance and seniority.[2] As a number of the petitioners had superior performance records, the average of their performance and seniority ratings with their marks on the written test entitled them to higher placement on the eligible list than certain of the candidates who made the list. Such petitioners have thus proven themselves better qualified for promotion to captain than some of those on the promotion list and their exclusion from the promotion list through *ex post facto* change in the pass mark is a denial of due process.

The present case, therefore, in addition to presenting the reasons for granting the writ stated at page 6 of the Petition relating to the civil right of the petitioners to promotion on a merit basis, also involves the right of the public to the services of the best qualified civil service personnel. Accordingly, the public interest would be served by the granting of the Petition.

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[1] Record, folios 61, 62.

[2] Record, folios 61, 62.

POINT III.

Conclusion.

It is respectfully submitted that the important issues presented of due process and equal protection warrant the intervention of the Supreme Court in the public interest.

Respectfully submitted,

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Counsel for Petitioner.